PERBADANAN PEMBANGUNAN PULAU PINANG

v.

CHONG AH YOK

HIGH COURT, PULAU PINANG
DATO' MOHAMED DZAIDDIN BIN HAJI ABDULLAH J.
[ORIGINATNG SUMMONS NO: 24-651-1992]
14 SEPTEMBER 1992

LAND LAW: Summary application for possession of land - O. 89 Rules of the High Court 1980 (RHC 1980) - Defendant registered proprietor of premises - Plaintiff claiming that defendant was registered as proprietor by deceit or unlawful means - Defendant in arrears of the balance of the purchase price - Defendant breaking into and unlawfuly remaining in occupation of premises - Whether plaintiff entitled to possession of premises - Whether defendant has indefeasible title.

PRACTICE & PROCEDURE: Defendant claiming plaintiff's application not in accordance with format provided by RHC 1980 - Whether defect fatal - Whether deviation or omission curable - Application of s. 62 Interpretation Act 1967.

The plaintiff and the defendant entered into an agreement whereby the plaintiff agreed to sell and the defendant agreed to buy a piece of property for RM144,576. One of the terms of the agreement was that the defendant as purchaser was not entitled to occupation or delivery of vacant possession of the said property until all monies were paid. The defendant was at all material times in arrears of the balance of the purchase price.

On 20 July 1992 the defendant unlawfully entered upon and broke into the premises and remained in occupation. Consequently the plaintiff terminated and rescinded the said agreement and demanded the defendant to quit the said property.

The defendant contended that he was the registered proprietor of the said property and as such his title in the said property was indefeasible. The defendant further claimed that the plaintiff's application was not made in accordance with the format provided in Form 8A of the RHC 1980 and applied to strike out the plaintiff's claim.

The plaintiff claimed that the defendant became registered as the proprietor by deceit or unlawful means and submitted that under the terms of the sale and purchase agreement the defendant was not entitled to possession until all monies due under the said agreement were settled. The plaintiff further submitted that the fact that the defendant was *prima facie* the registered owner of the said property was not relevant as O. 89 RHC 1980 could be used against any party who was not entitled to possession even though he was the registered owner.

Held:

[1] The defendant had defaulted in his payment of the balance of the purchase price and the plaintiff, through his solicitors, had terminated and rescinded the agreement and demanded possession of the said property.

[2] The presentation of Form 14A together with the issue document of title with the Land Registry whereby the defendant was duly registered as the proprietor of the said property was done without the consent of the plaintiff and at the time when the defendant had yet to settle the balance of the purchase price.

[3] Despite the plaintiff's refusal to deliver the keys to the premises, the defendant without the consent or licence of the plaintiff unlawfully entered upon the said property and broke into the premises and remained in possession or occupation thereof.

[4] There is nothing misleading in the originating summons which would tend to cause any substantial deviation from the original format. The deviation or omission to strictly follow Form 8A of the Rules is cured by s. 62 of the Interpretation Act 1967.

[Plaintiff's application for possession granted. Defendant's application to strike out dismissed with costs].

[Ed. Note: The learned Judge's decision was affirmed by the Supreme Court (*vide* Civil Appeal No. 02-408-92) on 18 January 1993 without any written grounds given**].**

Case referred to:

Bristol Corpn. v. Persons Unknown [1974] 1 All ER 593 ***(foll)***

Legislation referred to:

Interpretation Act 1967, s. 62
Rules of High Court O. 14, O. 18 r. 19, O. 89 r. 1 Form 8A
Rules of the Supreme Court O. 113 r. 1 (UK)

Other source referred to:
Supreme Court Practice 1991, Vol. 1, p. 1676

For the plaintiff - Foo Say Keow; M/s. Murad & Foo
For the defendant - Chong Ah Yok; Chong & Associates

JUDGMENT

Mohamed Dzaiddin Bin Haji Abdullah J:
This is an application for a summary order for possession of land and premises under O. 89 Rules of the High Court 1980 (RHC 1980).

By a sale and purchase agreement dated 13 November 1990 (the said agreement) the plaintiff agreed to sell and the defendant to purchase Plot No. L394 HS (D) 7148, Mukim 12 Daerah Barat Daya, Pulau Pinang, together with premises No. 25, Lorong Mahsuri 7 ("the said property") for RM144,576. At all material times the defendant has been in arrears of the payments of the balance of the purchase price. On 15 July 1992 the plaintiff notified the defendant that the amount due and owing by the defendant for the purchase price was RM70,000 and RM10,052.67 for interest on late payments. Under clause 14 of the said agreement, the defendant as purchaser was not entitled to occupation or delivery of vacant possession of the said property until all monies were paid. However, despite the said notice and non-payment of the balance purchase price and interest, the defendant on 20 July 1992 unlawfully entered upon and broke into the premises and remained in occupation. He also proceeded unlawfully to connect electricity and water supply to the premises and brought into the premises his furniture and household things. In the result, by the solicitors' letter dated 30 July 1992, the plaintiff terminated and rescinded the said agreement and demanded the defendant to forthwith quit the said property. Hence, on 4 August 1992 the plaintiff filed this application.

The defendant, an advocate and solicitor, personally entered an appearance on 12 August 1992 and five days later filed an affidavit in reply. He opposed the plaintiff's application on procedural grounds and on merit. On procedure he stated that the application under O. 89 was wrong, misconceived, frivolous and vexatious and an abuse of the process of the Court. On the merit, he claimed that as he remained the registered proprietor of the said property since January 1992 his title in the said property was indefeasible. It is noted that while the present application was awaiting trial, the defendant proceeded to file two separate applications on the same day, one to strike out the originating summons under O. 18 r. 19 (enclosure 10) and the other also to strike it out for non-compliance with O. 89 and Form 8A (enclosure 12).

At the hearing before me on 28 August 1992 I heard both enclosures 3 and 12 together so that the matter could be disposed off at one go. In my opinion, there was no necessity for the defendant to file the application to strike out the Originating Summons (enclosure 12) because the grounds of his application are similar to those raised in his affidavit in reply to the plaintiff's application for possession. The same applies to his application under O. 18 r. 19(1), which application would be redundant and a waste of judicial time if his objection in the present application is upheld. I feel sure that when this application under O. 18 r. 19 is heard, it will be struck out for an abuse of the process of the Court.

I shall now proceed to consider whether in the circumstances of the case, the plaintiff is entitled to a summary order for possession of the said property under O. 89. Before that, let me summarily deal with the point raised by the defendant that the plaintiff's application was not made in accordance with the format provided in Form 8A of the Rules. Admittedly, the originating summons did not state under its heading the following i.e. "(In the matter of ...)" and the prayer did not follow the format. However, reading the application as a whole, there is nothing in the originating summons which would tend to cause any substantial deviation from the original format. At any rate, I am satisfied that this deviation or omission to strictly follow Form 8A of the Rules is cured by s. 62 of the Interpretation Act 1967 which reads:

> Any written law prescribing a form shall be deemed to provide that an instrument or other document purporting to be in that form shall not be invalidated by reason of any deviation from the form if the deviation has no substantial effect and is not calculated to mislead.

On the main issue, the defendant submitted that the summary order under O. 89 did not apply against him because at the time when the notice to quit was served on him he was already the registered owner of the said property and

that his title to the said property was indefeasible. He further stated that he remained in occupation by virtue of being a registered proprietor and not as a tenant or licensee of the plaintiff.

In reply, Encik Foo, for the plaintiff, submitted that on the affidavit evidence of Puan Zainun bte. Abdul Rahman and the supporting exhibits, it was clearly shown that the defendant became registered as the proprietor of the said property by deceit or unlawful means. Counsel conceded that this was a matter of a separate litigation. However, the documents exhibited thereto showed that the defendant had been in arrears of the balance of the purchase price and overdue interest totalling RM80,052.67 and despite a formal demand had failed to pay any sum to the plaintiff. Consequently, the plaintiff determined the said agreement and repudiated the contract. Under clause 14, the defendant could not have possession of the said property until all monies due under the said agreement were settled and by clause 26, nothing contained therein should be construed as giving the defendant the right to enter into possession until he had performed and observed all conditions and stipulations in the said agreement.

Encik Foo further submitted that the fact that the defendant was *prima facie* the registered owner of the said property was not relevant because O. 89 could be used against any party who was not entitled to possession even though he was the registered owner. He relied on the following passage of the judgment of Pennycuick VC in *Bristol Corpn. v. Persons Unknown* [1974] 1 All ER 593 Ch.D. at p. 595:

> The point arises in this way. RSC O. 113 r. 1, is in the following terms:
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> 'Where a person claims possession of land which he alleges is occupied *solely* by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.'
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> Looking at the words of that rule, it seems to me to be clear that the order covers two distinct states of fact. The first is that of some person who has entered into occupation of the land without the licence or consent of the person entitled to possession or any predecessor in title of his and secondly that of the person who has entered into occupation of the land with a licence from the person entitled to possession of the land or any predecessor in title of his but who remains in such occupation without the licence or consent of the person entitled to possession or any predecessor in title.

Our RHC O. 89 is in *pari materia* with the English RSC O. 113. According to the Supreme Court Practice 1991 Vol. 1 p. 1576 - Scope of Order - this Order does not provide a new remedy but rather a new procedure for the recovery of possession of land which is in wrongful occupation by trespassers. Its machinery is designed to overcome the apparent shortcomings of the procedural law. "The application of this Order is narrowly confined to the particular circumstances described in r. 1, i.e. to the claim for possession of land which is occupied solely by a person or persons who entered into or remain in occupation without the licence or consent of the person in possession or of any predecessor of his. The exceptional machinery of this Order is plainly intended to remedy an exceptional mischief of a totally different dimension from that which can be remedied by a claim for the recovery of land by the ordinary procedure by writ followed by judgment in default or under O. 14. The Order applies where the occupier has entered into occupation without licence or consent ..."

After hearing Counsel and examining affidavits of the parties, I make the following findings of fact. First, it is clear to me that the defendant had defaulted in his repayment of the balance of the purchase price and the arrears of interest for a total sum of RM80,052.67. In consequence thereof, the plaintiff through its solicitors terminated and rescinded the said agreement and demanded possession of the said property. It is noted that the defendant did not specifically deny the above facts in his supporting affidavit. Secondly, the presentation of Form 14A together with the issue document of title with the Land Registry Penang whereby the defendant was duly registered as the proprietor of the said property was done without the consent of the plaintiff and at the time when the defendant had yet to settle the balance of the purchase price. Here, it is my finding that the duly executed Form 14A and the title deed were released by the plaintiff to the defendant to enable him to arrange for a bank loan and that it was released to him on his undertaking to return the said documents if he could not obtain the loan to settle all monies due under the said agreement.

In fact, the plaintiff's solicitor did demand for their return to which he did not respond. Yet, in breach of the said undertaking and without the plaintiff's consent he proceeded to register the said property in his name. Thirdly, it follows that as a result of the registration of the transfer of ownership in the defendant's name a police report had been lodged by the plaintiff's servant or agent concerning the same. Fourthly, despite the plaintiff's refusal to deliver the keys to the premises, the defendant without the consent or licence of the plaintiff, its servant or agent unlawfully entered upon the said property and broke into the premises and remained in possession or occupation thereof. Upon the above findings of fact and on the true construction of O. 89 r. 1 as enunciated in *Bristol Corporation (supra)* it is clear to me that the defendant had entered into and remained in occupation of the said property without the consent or licence of the plaintiff, its servants or agents. In the result, in my judgment, O. 89 r. 1 does apply to the defendant.

Perhaps, a question may be asked if the remedy sought for by the plaintiff here should be made by filing a writ for recovery of the land followed by an application for O. 14 judgment, in view of the defendant's defence that he is the registered owner of the said property, whose title is indefeasible. My answer is: since this Order is "plainly intended to remedy an exceptional mischief of a totally different dimension from that which can be remedied by a claim for the recovery of land by writ" and that this O. 89 r. 1 applies where the occupier has entered into occupation of the said property without consent or licence, it is perfectly in order for the plaintiff to bring this application.

In the circumstances of the whole case and in the exercise of my discretion, an order for possession should be made on this summons. Accordingly, I grant an order in terms of prayer (a) in enclosure 3. The defendant shall vacate and hand over possession of the premises on or before 1 November 1992. I also overrule the defendant's objections and dismiss his application in enclosure 12 with costs.

TEE YIH JIA FOOD MANUFACTURING PTE. LTD.

v.

SEET CHUAN SENG & ANOR.

HIGH COURT, KUALA LUMPUR
DATO' HAJI ABDUL MALEK BIN HAJI AHMAD J.
[CIVIL SUIT NO. C1305 OF 1985]
21 JANUARY 1993

TRADE MARKS: Passing off- Product established in Singapore - Defendant forming company in Malaysia - Carrying on a similar business using same name TYJ, logo and get up - Actual damage in passing off - Must it be proved.

The plaintiff, since October 1969, has been in the popiah (spring roll) skin business under the name "Tee Yih Jia Po Piah Dried Pastry Factory (Pte.) Ltd.", a company registered in Singapore. The first defendant formed the 2nd defendant company in Malaysia and carried on a similar business using the same name TYJ, logo and get up.

On 30 September 1980, the 1st defendant and the plaintiff's chairman and managing director, Goi Seng Hui (GSH) entered into an agreement wherein *inter alia* it was agreed that the 1st defendant will not be prohibited from carrying on the business of manufacturing or dealing in popiah skins. But was the first defendant entitled to use the name TYJ, logo and get up especially so after the plaintiff has acquired a substantial reputation and goodwill in respect of the said name, logo and get up in this region?

Held:

[1] From the evidence the name TYJ, logo and get up has become distinctive of the plaintiff's products and the use by the defendants certainly was likely to deceive or cause deception.

[2] The fact that the defendants are selling popiah skins in this country has not been disputed. Whether or not there is a likelihood of damage or actual damage from the misrepresentation can be gathered from the fact that there is a likelihood of diversion of customers from the plaintiff to the defendants which would result in loss to the plaintiff in view of the similarity in name, logo and get up and type of product dealt with by both parties. Consequent to this competition, there is bound to be actual loss to the plaintiff.